



Department of Energy
Richland Operations Office
P.O. Box 550
Richland, Washington 99352

October 7, 2013

Certified Mail

Mr. Milton Smith
Sherman & Howard L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, CO 80903-4576

Dear Mr. Smith:

FREEDOM OF INFORMATION ACT REQUEST (FOI 2013-01415)

This is a final response to your request for information that you sent to the U.S. Department of Energy (DOE) Headquarters Freedom of Information Act (FOIA) office. Your request has been forwarded to this office for response. In your request you asked for the following:

- 1) "All communications, including e-electronic communications (including but not limited, email) from January 1, 2012 through the present between the Government, including the U.S. Department of Energy (DOE) or its representatives, and Bechtel National, Inc. or its representatives, relating to award of any subcontract for the LAW and LAB penetration seals work for Solicitation/Contract No. DE-AC27-01RL14136."
- 2) "All communications, including electronic communications (including, but not limited, email) from January 1, 2012, through the present between the Government, including DOE or its representatives, and Bechtel National, Inc. or its representatives, to or from Performance Contracting Inc. (PCI) relating to award of any subcontract for the LAW and LAB penetration seals work for Solicitation/Contract No. DE-AC27-01RV14136."

Your request was processed under the provisions of the FOIA and was assigned to the DOE Office of River Protection Procurement Division and Bechtel National Inc., the offices most likely to have responsive documents.

The documents are enclosed and certain deletions have been made in the documents pursuant to Exemptions 3, 4, 5 and 6 of the FOIA.

Exemption 3 incorporates into the FOIA other laws that restrict the availability of information. To qualify under this exemption, a statute must require that information be withheld in such a manner as to leave no discretion to the agency. The Defense Authorization Act of 1997, Public Law 104-201, is such a statute. This statute prohibits the release of unsuccessful proposal information. In the documents, we have deleted the names of the unsuccessful offerors, and any information provided by them, including detailed price and financial information, work performance, organizational and work structures. This information was provided in the unsuccessful offerors proposals and therefore must be withheld.

In addition, The Defense Authorization Act of 1997, also prohibits the release of contractor proposal information unless the information is set forth or incorporated by reference in the contract. In the documents, we have also deleted information provided by the successful offeror, Performance Contracting, Inc., that was neither set forth nor incorporated by reference in the subcontract. This information includes detailed price and financial information, proposed organizational and work breakdown structures.

We have also made deletions in the documents, as marked, pursuant to Exemption 4. Exemption 4 of the FOIA was meant to protect the disclosure of confidential business information. If the documents you are requesting were released in their entirety, your company could gain insight into Performance Contracting, Inc., business practices and pricing strategies which are unique to them and have been developed at their expense. The result of such a release would place them at a competitive disadvantage by giving their competitors insight into how they do business.

In interpreting the FOIA, courts have held that information may be withheld if disclosure would be likely to impair the government's ability to obtain similar information in the future. If specific pricing information, work breakdown structures, management strategies, allocation of costs, and confidential business information were released to competitors, it would clearly impair the government's ability to obtain the most favorable terms in future procurements because companies would be less willing to risk disclosure of their information.

Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency..." Exemption 5 incorporates the deliberative process privilege that protects advice, recommendations, and opinions that are part of the process by which agency decisions and policies are formulated.

The factors that are weighed to determine whether documents are protected by the deliberative process privilege include: (1) whether the documents are "deliberative" (i.e., whether it reflects the give-and-take of a consultative process); (2) whether the documents are so candid or personal in nature that public disclosure would stifle honest and frank communication in the future; and (3) whether the documents are recommendatory of what will become a final document.

Below is a listing of the categories of information that has been withheld from the documents pursuant to Exemption 5:

- 1) Opinions of the procurement review team reflected in numerical scores, and adjectival ratings.
- 2) Analysis and written comments of the procurement review board team regarding each proposal, including the strengths and weaknesses.
- 3) Detailed recommendations, including summaries and evaluations of submitters' detailed price information that were provided to the procurement review team for decision and were based upon expressed opinions on legal and policy matters.

These categories consist of proposed recommendations, consultations and positions presented in the preparation of agency policy by the procurement review team. Therefore, this information has been deleted. Material determined to be exempt from mandatory disclosure may be released if disclosure is determined to be in the public interest. Release of the deleted information would cause a chilling effect upon the agency as it would impact the ability and willingness of government employees to make open and honest recommendations concerning similar matters. If employees were inhibited in providing frank and honest recommendations, the agency would be deprived of the benefit of their open opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound and correct functioning of government programs and operations. We have determined the public interest is best served by non-disclosure because disclosure of this information would harm the government's ability to effectively award contracts.

Lastly, we have deleted personal cell phone numbers belonging to employees pursuant to Exemption 6 of the FOIA. Exemption 6 provides that an agency may protect from disclosure all personal information if its disclosure would constitute a clearly unwarranted invasion of privacy by subjecting the individuals to unwanted communications, harassment, intimidation, retaliation, or other substantial privacy invasions by interested parties.

All releasable information in the documents has been segregated and is being provided to you. The undersigned individual is responsible for this determination. You have the right to appeal to the Office of Hearings and Appeals, as provided in 10 CFR 1004.8, for any information denied to you in this letter. Any such appeal shall be made in writing to the following address: Director, Office of Hearings and Appeals (HG-1), U.S. Department of Energy, L'Enfant Plaza Building, 1000 Independence Avenue SW, Washington, D.C. 20585-1615, and shall be filed within 30 days after receipt of this letter. Should you choose to appeal, please provide this office with a copy of your letter.

Mr. Milton Smith

-4-

October 7, 2013

Costs associated with your request are as follows:

Reproduction – 127 pages @ \$.05/page	\$	6.35
Search time – 30 minutes @ \$94.55/hour		47.28
Review time – 3 hours @ \$47.16/hour		<u>141.48</u>
Total	\$	195.11

Your check should be made payable to the U.S. Department of Energy and forwarded to my attention at: DOE, P.O. Box 550, Richland, Washington 99352.

Should you have any questions regarding your request, please contact me on (509) 376-6288.

Sincerely,

-Original Signed By-

Dorothy Riehle
Freedom of Information Act Officer
Office of Communications
and External Affairs

OCE:DCR

Enclosures